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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 282

LEGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY,
Petitioners,

vs.

J. H. WIGGINS

REPLY BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CHARLES O. ANDREWS, JR.
Attorney for Respondent.

JOHN S. LAVIN,
Of Counsel for Respondent,

Both: *302 Florida Bank Bldg.,*
Orlando, Florida.

J. W. HUNTER,
Of Counsel for Respondent,
Tavares, Florida.

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I.

Statement of the Case

Respondent refutes the following statement of fact unsupported by reference to the record contained on page 8 of the petition,

"Moore couldn't see ahead because Wiggins, the Foreman, was in front of him and Moore in order to look ahead, had to look around or over Wiggins, and was depending on Wiggins."

The Circuit Court of Appeals in its opinion states,

"Moore testified that had he been looking he could have seen the switch target easily, probably for a distance of three or four hundred feet." (R. 60-61).

The by-play between Moore and counsel for the defendant from which the latter draws the conclusion that Moore was depending on Wiggins speaks for itself. (R. 65).

Petitioner's statement omits the fact that Moore had been operating Wiggin's motor car for more than ten years for the reason that he was "better able to do so" within the meaning of Rule XII 3. (R. 28, 29, 66).

Otherwise the statement of the case is reasonably accurate, though more fairly and concisely stated in the opinion of the Circuit Court of Appeals. (R. 91-94).

We wish to call attention, however, to the ambiguity between Rule 1169 as construed by defendants and Rule XII 3, later promulgated, and point out that defendants not only stopped at establishing that each of these rules had once been promulgated, but resisted successfully every effort of the plaintiff to resolve the ambiguity (R. 28-30; 70-75;) which the court below held to be an improper exclusion of evidence (Opinion R. 94).

II.

Jurisdiction

Respondent admits jurisdiction, but denies that there is anything contained in the opinion below which places this case within the provisions of Section 5 (b) of Rule 38 of this Court.

III.

There Are No Reasons for the Allowance of the Writ.

1. There is no conflict with Louisville & N. R. Co. v. Davis (CCA 6) 75 Fed (2d) 849, cert. den. 296 US 603, which was a case in which plaintiff was foreman in charge of removing a brace from a piling by crane. One of his workmen warned him that the whole piling was coming up with the brace, indicating danger. Davis ordered the operation to proceed, which order was obeyed without negligence, and the piling fell loose, injuring Davis. It was very properly held that the sole proximate cause of Davis' injury was his own order, it being shown he had full opportunity to perceive and appreciate the danger.

The case at bar falls rather within the purview of Atlantic Coast Line Railroad Co. v. Jeffcoat, (Ala.) 107 So. 456, cert den., 271 U. S. 688, in which the plaintiff section crew foreman was held entitled to recover under these circumstances. The crew was employed in gauging and relining the rails and Jones, a crew member, was delegated the task of placing and removing the gauge from the tracks, this being an instrument which when left on the rails would probably wreck a passing train. As a train was seen approaching, the foreman ordered his men to "clear the track," and turned to other tasks. As the train was almost upon him, the foreman discovered the gauge had not been removed, and, acting in an emergency to remove it, he was injured. It was argued that the cause of his injury was his own negligent supervision, but it was held that such negligence on his part was at most contributory.

2. There is no conflict with Unadilla Valley Railroad Co. v Dibble (CCA 2) 31 F 2d 239, the case at bar coming within the principles explained in Miller v. Central Railway Co., of New Jersey (CCA 2) 58 F 2d 635, cert. den. 287 U. S. 617, for the

reason that the rules plaintiff is charged with violating are "rules generally enjoining caution, or responsibilty" and not rules prescribing "specific conduct." Gildner vs. Baltimore & Ohio Ry. Co. (CCA 2) 90 F 2d 635; Ballard v. Atchison T. & S. F. R. Co. (CCA 5) 100 F. 2d 162; Atchison T. & S. F. R. Co. vs. Ballard (CCA 5) 108 F. 2d 768).

3. There is no probable conflict with the Caldine line of decisions of this Court cited by petitioner, for the reason that this case is governed by the later decision of this Court in Rocco vs. Lehigh Valley R. Co., 288 U. S. 275, distinguishing the respective factual situations. It is there pointed out that the negligence sought to be attributed to the defendants in the Caldine line of cases was too remote in the light of plaintiffs' conduct to be actionable. To reach such a conclusion here, it is necessary to so discount defendants' admitted negligence in leaving a main line switch open, and in so operating the motor car, through Moore, as to collide with such switch though it was sufficiently visible to Moore to enable him to perceive it in time to stop.

Respectfully submitted,

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